MM Docket Nos. 98-204 & 96-16

Reclaiming America's Future!

February 17, 1999

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Re: Comments on Proposed Rules on Equal Employment Opportunity

Pacific Legal Foundation presents the following comments on the new equal employment opportunity (EEO) rules proposed by the Federal Communications Commission (FCC) at Federal Register, Vol. 63, No. 230 at 66,109-10.

INTEREST OF PACIFIC LEGAL FOUNDATION

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. The PLF Board evaluates the merits of any contemplated legal action and authorizes such action only where PLF's position has broad support within the general community. The PLF Board has authorized the filing of comments in this matter. PLF strongly supports the policy that the United States Constitution prohibits discrimination against, or preference for, any individual or group on the basis of race, ethnicity, or gender. In pursuance of this policy PLF has participated in numerous cases opposing discrimination and preferences including *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Department of General Services v. Superior Court*, 85 Cal. App. 3d 273 (1978); *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997). PLF believes that government

has a heightened responsibility to ensure that it does not promote discrimination or preference on the basis of race or gender. PLF provides these comments because of its concern that FCC's proposed EEO rules continue FCC's policy of preference on the basis of race and gender.

THE *LUTHERAN CHURCH* RULING

FCC's prior EEO rules were declared to violate the equal protection component of the Fifth Amendment in *Lutheran Church-Missouri Synod v. Federal Communications Commission*, 141 F.3d 344 (D.C. Cir. 1998). As described by the court, FCC's EEO rules imposed two basic obligations on radio stations. First, stations were forbidden to discriminate in employment because of race, color, religion, national origin, or sex. Second, stations were required to adopt an EEO program targeted to minorities and women. *Id.* at 346.

Under FCC's EEO program, stations were required to adopt a plan for (1) disseminating the EEO program to job applicants and employees; (2) using minority and women-specific recruiting sources; (3) evaluating the stations's employment profile and job turnover against the availability of minorities and women in its recruitment area; (4) offering promotions to minorities and women in a nondiscriminatory fashion; and (5) analyzing its efforts to recruit, hire, and promote minorities and women. *Id.*

The court found that this EEO program violated the equal protection rights of the church. Specifically, the court held:

> [T]he EEO regulations before us extend beyond outreach efforts and certainly influence ultimate hiring decisions. The crucial point is not, as the Commission and DOJ argue, whether they require hiring in accordance with fixed quotas; rather, it is whether they oblige stations to grant some degree of preference to minorities in hiring. We think the regulations do just that. The entire scheme is built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation.

Id at 351-52.

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VIOLATIONS OF THE *LUTHERAN CHURCH* RULING

The newly proposed rules maintain the provisions of the former flawed program of encouraging race preference in direct violation of the finding of the Court of Appeals that these provisions were unconstitutional. As set forth below, FCC maintains all of the components of the EEO program that was struck down in *Lutheran Church.*

(1) Disseminating the EEO program to job applicants and employees. Proposed Rule Section 73.2080(c)(2)(i) requires a station's EEO Analysis to "Disseminate its equal employment opportunity to job applicants and employees."

(2) Using minority and women-specific recruiting sources. The Proposed Rules require stations to: (a) "Assess the productivity of recruiting sources." Subsection (c)(2)(iv). (b) Retain records to prove that it has satisfied the EEO requirements including (i) listings of recruiting sources utilized for each vacancy and the date the vacancy was filled; (ii) dated copies of all advertisements, bulletins and letters announcing vacancies; and (iii) compilations totaling the race, ethnic origin, and gender of all applicants generated by each recruiting source according to vacancy. Subsection (c)(3). While this rule does not explicitly require the use of minority and women recruiting sources, the requirements to list and assess the productivity of recruiting sources in conjunction with the requirement of compilations of the race, ethnic origin, and gender of all applicants generated by each recruiting source shows FCC's plain intent that stations use minority and women-specific recruiting sources or suffer the consequences.

(3) Evaluating the station's employment profile and job turnover against the availability of minorities and women in its recruitment area. Stations are directed by the proposed rules to analyze their efforts to recruit, hire, and promote without discrimination and address any difficulties encountered in implementing their EEO program. As part of its license renewal application a station shall submit a statement detailing its analysis of such efforts for the 12 months prior to license expiration. Subsection (c)(2). When considered in conjunction with the command in Subsection (c)(3)(iii) for compilations totaling the race, ethnic origin, and gender of all applicants generated by each recruiting source, it is plain that FCC intends to evaluate a station's race and sex proportionality in its workforce as part of the license renewal process.

(4) Offering promotions to minorities and women in a nondiscriminatory fashion. The proposed regulations continue this requirement in Subsection (c)(2)(vi): "Offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility." The meaning of this superficially nondiscriminatory provision is

clarified in Subsection (c)(2)(viii): "Avoid the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women." This is a plain signal to stations that they are at risk of having their license application denied if they use tests that may put minorities and women at a disproportional advantage.

It should be emphasized that FCC uses a far harsher test than that set forth by Section 105 of Title VII, 42 U.S.C. § 2000e-2(k)(1)(A). That test states that an unlawful employment practice based on disparate impact is established only if a complaining party demonstrates that the employer uses a particular employment practice that causes a disparate impact and the employer fails to demonstrate that the practice is job related for the position in question and is consistent with business necessity. Unlike Title VII, FCC puts the burden on the station rather than the employee and further does not permit any showing by the station that the selection techniques and tests are job related and necessary. The more basic question of what authority FCC has to establish more stringent EEO regulations than those permitted under Title VII is discussed below.

(5) Analyzing its efforts to recruit, hire, and promote minorities and women. This policy is continued in Subsection (c)(2)(iv): "Assess the productivity of recruiting sources." Indeed, FCC goes far beyond requiring a station's mere analysis of its EEO efforts. Subsection (c)(2)(vi) requires offers of promotions to qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility. Subsection (c)(2)(viii) requires avoidance of the use of selection techniques and tests that have the effect of discriminating against qualified minorities and women. FCC makes plain that stations are expected to recruit, hire, and promote minorities and women, even if they do not have the qualifications or pass the tests required of other personnel.

The Court of Appeals addressed this issue well:

> If the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated. But as the Commission itself has said, "[o]ur broadcast EEO rules require that broadcast licensees ... establish and maintain an affirmative action program for qualified minorities and women."

Lutheran Church, 141 F.3d at 351(footnote omitted).

The court then noted:

> The Commission and DOJ nevertheless insist that the FCC's program should be regarded as if it did no more, or not significantly more, than seek non-discriminatory treatment of women and minorities. That argument--which logically suggests the government should have challenged the very applicability of the Fifth Amendment--presupposes that non-discriminatory treatment typically will result in proportional representation in a station's workforce. The Commission provides no support for this dubious proposition and has in fact disavowed it, saying that "we do not believe that fair employment practices will necessarily result in the employment of any minority group in direct proportion to its numbers in the community." *EEO Processing Guidelines for Broadcast Renewal Applicants*, 79 F.C.C.2d 922, ¶ 19 (1980).

Id. at 352.

Lutheran Church noted FCC's history of using numerical quotas in which stations would have their EEO programs reviewed by FCC if they did not meet a "goal" of employing minorities and women at a ratio of 50% of their workforce availability and found:

> It cannot seriously be argued that this screening device does not create a strong incentive to meet the numerical goals. No rational firm--particularly one holding a government-issued license--welcomes a government audit.

Id. at 353.

The FCC proposed rules continue this policy of coercing stations to play the numbers game. "Nor can it be said that the Commission's parity goals do not pressure license holders to engage in race-conscious hiring." *Id.* at 352. As the court pointed out, FCC changed its policy in 1987 to deemphasize statistics, but the new policy did not abandon the 1980 numerical processing guidelines. *Id.* There is no indication that FCC has abandoned numerical processing in the proposed regulations. Because the proposed rules continue FCC's policy of pressuring license holders to engage in race and gender-conscious hiring, the proposed rules continue to violate the equal protection component of the Fifth Amendment.

FCC LACKS THE AUTHORITY TO ADOPT INDEPENDENT EEO RULES

The *Lutheran Church* decision raised the issue of FCC's competence to implement and enforce a separate EEO program. The court pointedly observed: "'FCC is not the Equal Employment Opportunity Commission [EEOC] . . . and a license renewal proceeding is not a Title VII suit.'" 141 F.3d at 354. Indeed, as noted above, FCC's proposed rules are much harsher than permitted by Congress under Title VII. FCC's proposed Subsection (c)(2)(viii) requires stations to avoid the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women. Significantly, the term "qualified" is not further defined and is apparently left to the subjective judgment of FCC. Thus, licensees use "selection techniques" such as past experience and training or tests such as typing tests for secretaries at considerable risk to renewal of their licenses. FCC does not permit the employer to demonstrate that its selection techniques or tests are job related and consistent with business necessity as provided for in Section 105 of Title VII, 42 U.S.C. § 2000e-2(k)(1)(A). Thus what is lawful under Title VII violates the FCC rules. The basis of any authority for FCC to adopt more stringent EEO rules than EEOC is not explained. However, FCC states "its belief that Congress has ratified the Commission's authority to adopt broadcast rules; that equal employment of minorities and women furthers the Commission's public interest goal of diversity of programming; and that the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services, as directed by Section 309(j) of the Communications Act, is furthered by EEO requirements." 63 Fed. Reg., No. 230 at 66,105.

Lutheran Church found that "the only possible statutory justification for the Commission to regulate workplace discrimination would be its obligation to safeguard the 'public interest,' and the Supreme Court has held that an agency may pass antidiscrimination measures under its public interest authority only insofar as discrimination relates to the agency's specific statutory charge. Thus the FCC can probably only regulate discrimination that affects 'communication service'--here, that means programming." 141 F.3d at 354 (citations omitted). But as the court pointed out, "'the interest in diversity of viewpoints provides *no legitimate*, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior.'" *Id.* at 355 (emphasis by the court).

Lutheran Church held that FCC's EEO rules were obviously not narrowly tailored. *Id.* at 356. The court found that although the minority ownership preferences involved in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), rested on interstation diversity, FCC's EEO rules seek *intrastation* diversity. *Lutheran Church*, 141 F.3d at 355. The

court further found that *Metro Broadcasting* never suggested that low-level employees would have any influence on broadcasts. Nor did FCC introduce any evidence linking low-level employees to program content. *Id.* at 356. The court therefore held that "the regulations could not pass the substantial relation prong of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny." *Id.* The proposed rules are similarly deficient.

The proposed rules are not in fact EEO rules; they are race and gender proportionality rules. FCC's intent is plainly set forth in its statement that "equal employment of minorities and women" furthers FCC's goal of diversity of programming. Fed. Reg., Vol. 63, No. 230 at 66,105. The stated requirement is not equal employment *opportunity*; it is equal employment. This goal of racial proportionality or "diversity" was specifically disapproved in *Lutheran Church*.

> Perhaps this is illustrative as to just how much burden the term "diversity" has been asked to bear in the latter part of the 20th century in the United States. It appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ("affirmative action" has only a temporary remedial connotation) and as a synonym for proportional representation itself.

141 F.3d at 356.

In *Lesage v. State of Texas*, ___ F.3d ___, 1998 WL 717230 (5th Cir. 1998), the court likewise found that diversity, the justification given for the University of Texas' racial preferences, was not a compelling state interest that satisfies the strict scrutiny standard. That court, *id.* at 6, quoted the finding in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), that "any consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest." *Lesage* further cited *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996) (*en banc*), in which the court declined to endorse diversity as an appropriate justification for EEO in the employment context pursuant to Title VII. These decisions of the federal courts of appeals make clear that "diversity" is not an acceptable basis for a policy of racial preferences by a government agency. FCC's use of diversity as the basis of its EEO program shows that it lacks the expertise necessary to implement such a program. But even more basic, FCC lacks the statutory authority to preempt EEOC's rules on nondiscrimination by adopting its own rules which contravene Title VII.

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CONCLUSION

Because FCC lacks the legal authority and expertise to adopt and enforce equal employment opportunity rules, Pacific Legal Foundation strongly recommends that FCC withdraw its proposed EEO rules and leave the subject matter to the agency designated by law to implement and enforce such rules, the Equal Employment Opportunity Commission.

Respectfully submitted,

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